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Wolf Creek Nuclear Operating Corporation and United Government Security Officers of America, International Union and its Local 252. Case 14–RC–160836

August 26, 2016

DECISION ON REVIEW AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On October 14, 2015, the Regional Director for Region 14 issued a Decision and Order, in which he found that an *Armour-Globe*¹ self-determination election in a unit of all full-time and part-time Security Training Instructors (SIs) at the Employer’s Burlington, Kansas facility was not appropriate. He concluded, instead, that the SIs are managerial employees excluded from the protection of the Act, and accordingly dismissed the petition. Thereafter, in accordance with Section 102.67 of the Board’s Rules and Regulations, the Petitioner filed a timely request for review, contending, inter alia, that the Regional Director erred in finding that the SIs are managerial employees. The Employer filed an opposition.

On February 9, 2016, the National Labor Relations Board granted the Petitioner’s request for review with respect to whether the SIs are managerial employees.² Thereafter, the Employer and the Petitioner filed briefs on review, as did amicus the International Brotherhood of Electrical Workers, Local 225 (IBEW Local 225).

The Board has delegated its authority in this proceeding to a three-member panel.

The Board has carefully considered the entire record in this proceeding,³ including the briefs on review. For the reasons set forth below, we find, contrary to the Regional Director, that the Employer has not established that the SIs are managerial employees.

FACTS

The Employer operates a nuclear power reactor facility in Burlington, Kansas. At that facility, the Petitioner currently represents a unit of “all full-time and regular part-time Armed Response Officers, Senior Security Officers, Access Control Officers, and Watchpersons employed by the [Employer] as guards as defined in Section

¹ *Armour & Co.*, 40 NLRB 1333 (1942); *Globe Machine & Stamping Co.*, 3 NLRB 294 (1937).

² The Board denied review in all other respects.

³ The Petitioner and the Employer stipulated that the record from case 14–RC–158769 could be considered in the present case; thus, we have considered the record from that case as well.

9(b)(3) of the National Labor Relations Act” (collectively, the SOs). The Petitioner and the Employer stipulated that the SIs, like the SOs, are also guards within the meaning of Section 9(b)(3).

As a nuclear power reactor facility operator, the Employer is required to develop a training and qualification plan that complies with Nuclear Regulatory Commission (NRC) regulations, and the NRC must approve that plan. The record establishes that, in developing this plan, the Employer also treats NRC Regulatory Guide 5.75 as a de facto regulation rather than as mere “guidelines.”⁴

The four SIs work in the Security Support Section of the Employer’s Security Department and are directly supervised by the Security Training Supervisor. The SIs are not required to have any outside training or education, but they must have 3 years of experience working in security or at a nuclear power reactor facility, must be certified in firearms training, and must pass instructor training. Generally speaking, the SIs conduct initial and continuing training with the SOs and SO supervisors. The SIs spend 60 to 70 percent of their time conducting training; the remainder of their time is spent developing training materials and otherwise preparing to train the SOs and SO supervisors.

The SIs have four major job duties. First, the SIs develop the lesson plans for classroom-style training programs, and they conduct the training itself. In creating the lesson plans, the SIs must comply with the NRC regulations, and, as discussed above, they comply with NRC Regulatory Guide 5.75, as well. The NRC regulations require the Employer to identify the critical tasks that must be performed to provide each specific security function, and NRC Regulatory Guide 5.75 states that the Employer should develop a comprehensive list of the training elements for each of those critical tasks. Attachment 1 to NRC Regulatory Guide 5.75 lists 28 critical tasks,⁵ the training elements for each critical task, the positions to which each training element applies, the frequency with which each training element should be tested, and the method of testing for each training element.

⁴ The Introduction to NRC Regulatory Guide 5.75 states that “[t]his regulatory guide describes approaches and methodologies that the [NRC] staff considers acceptable for the training and qualification of security personnel at nuclear power reactor facilities,” but that, as a regulatory guide, employers are not required to comply with it. However, witnesses for both the Employer and the Petitioner testified that the Employer complies with NRC Regulatory Guide 5.75 and described it as containing “requirements.”

⁵ NRC Regulatory Guide 5.75 states that an employer’s NRC-approved training and qualification plan should reflect these 28 critical tasks unless a task is not applicable to an employer’s operation, and that an employer may consider adding additional tasks based on site-specific duties. Only one of the 28 enumerated tasks is not applicable to the Employer’s operation.

The SIs revise the lesson plans as necessary to incorporate new or revised NRC regulations and changes in past practices or management expectations.

After the SIs have developed or revised the lesson plans, they may be reviewed by an end user, such as an SO, and are always reviewed by the Security Training Supervisor and approved by the Security Support Superintendent. The lesson plans are expected to be complete when submitted for review, and are normally approved with only minor changes.

When conducting the training itself, the SIs have the authority to decide if additional documents will be given to their students, if instructional videos will be shown, or if subject matter experts will lecture. At the conclusion of a given training program, the SIs do not actually certify the SOs in any of the required areas, but simply record the date of completion. The SOs' own supervisors conduct on-the-job training and certify that the SOs are qualified in the required subject areas.

Second, the SIs create and administer the initial qualification exams and the annual requalification exams that the SOs and SO supervisors must pass. To create the exams, the SIs consult a database that randomly selects questions and then confirm that the selected questions cover all of the elements required by NRC Regulatory Guide 5.75.⁶ Most of the exam questions in the database were written by SIs, but the SOs and SO supervisors may also write questions. The Security Training Supervisor must approve all exam questions. The NRC regulations require that personnel must achieve a minimum score of 80 percent to pass an exam.

Third, the SIs conduct weapons training, qualification, and requalification for the SOs and SO supervisors and operate the Employer's firing range. The NRC regulations and, in particular, NRC Regulatory Guide 5.75, contain extensive instructions for weapons training,⁷

⁶ NRC Regulatory Guide 5.75 states that, at a minimum, the exams should test the following elements: (1) role of security personnel in supporting safe operations of the facility; (2) the use of deadly force, including the principles involved in the application, escalation, and de-escalation of force; (3) 10 CFR Part 73 requirements for the protection of Safeguards Information; (4) the authority of private security personnel; (5) knowledge of who has power of arrest and authority to detain; (6) authority to search individuals and seize property; (7) offsite law enforcement response; (8) tactics and force that an adversary group might use to achieve its objectives; and (9) response force deployment, tactical movement withdrawal, and use of support fire.

⁷ NRC Regulatory Guide 5.75 provides instructions for training employees on the skills and abilities required by the NRC regulations, which are mechanical assembly, disassembly, weapons capabilities, and fundamentals of marksmanship; weapons cleaning and storage; combat firing (day and night); safe weapons handling; clearing, loading, unloading, and reloading; firing under stress; zeroing weapons and weapons sighting adjustments; target identification and engagement; weap-

qualification, and requalification.⁸ The weapons qualification and requalification tests are pass/fail as determined by a laser system.

Fourth, the SIs design, conduct, and evaluate the quarterly tabletop tactical response drills and the annual force-on-force exercises, which are required by the NRC regulations. The drills and exercises are intended to test both the participants and the Employer's defense plan. The NRC regulations identify the types of threats that the Employer must be prepared to defend against, and Regulatory Guide 5.75 lists the key program elements that should be considered when creating scenarios for drills and exercises.⁹ In addition, NRC Regulatory Guide 5.75 provides extensive guidance on the preparation and conduct of the drills and exercises.¹⁰ Further, NRC Regulatory Guide 5.75 outlines the critique process, the final report, and the identification and resolution of deficiencies after a drill or exercise is completed.

ANALYSIS

Based on the foregoing facts, the Regional Director found that the SIs formulate and effectuate the Employer's policies by creating, implementing, and enforcing the Employer's security training programs, and that the SIs' interests are more closely aligned with management than the SOs because they plan and conduct training for the SOs and, in particular, the SO supervisors. The Peti-

ons malfunctions; cover and concealment; weapons familiarization; and use of deadly force.

⁸ For example, NRC Regulatory Guide 5.75 provides guidance on the following elements that should be included in a tactical qualification course: (1) the combined use of handguns and shoulder-fired weapons employed during a contingency event according to the employer's protective strategy; (2) firing from a reasonable and representative facsimile of employer defensive positions, elevations, and distances; (3) appropriate levels of stress and physical demands (e.g., engaging targets while on the move); (4) proper cover and concealment tactics while engaging multiple targets, moving targets, and decision making targets; (5) the ability to transition from one type of firearm to another; (6) the ability to recover from simulated weapon malfunctions (e.g., dummy rounds); (7) adherence to the safe handling of firearms during simulated courses of fire; (8) firing at multiple targets, loading, and reloading while wearing a protective mask (gas mask); (9) non dominant (support) hand shooting; (10) use of the minimum quantity of combined handgun and shoulder-fired weapon ammunition necessary to demonstrate the ability to effectively implement the employer's protective strategy.

⁹ More specifically, NRC Regulatory Guide 5.75 lists the following key program elements: (1) responding with sufficient numbers of security personnel; (2) responding with appropriate timelines; (3) responding to protected positions; (4) responding with appropriate armament; and (5) providing target set protection. It also lists 15 other program elements that "contribute to the successful demonstration of the key elements."

¹⁰ In brief, NRC Regulatory Guide 5.75 provides instructions on command and control; controller training and qualification process; controller knowledge; training design, development, and implementation; safety; participant responsibilities; and rules of conduct.

tioner and IBEW Local 225 primarily argue that the SIs are not managerial employees because any discretion that they exercise is severely restricted by the NRC regulations. For the following reasons, we reverse the Regional Director and find that the Employer has not established that the SIs are managerial employees.

“Managerial employees are defined as those who formulate and effectuate high-level employer policies or ‘who have discretion in the performance of their jobs independent of their employer’s established policy.’” *The Republican Co.*, 361 NLRB No. 15, slip op. at 3 (2014) (quoting *General Dynamics Corp.*, 213 NLRB 851, 857 (1974)); see generally *NLRB v. Yeshiva University*, 444 U.S. 672, 682 (1980). “Although the Board has no firm criteria for determining managerial status, an employee will not ordinarily be excluded as managerial unless he represents management interests by taking or recommending discretionary actions that effectively control or implement employer policy.” *The Republican Co.*, supra, slip op. at 3–4. The party asserting managerial status bears the burden of proof. See *id.*, slip op. at 4.

The fact that employees train or instruct other employees does not, in itself, make them managerial employees. To the contrary, the Board has found that employees who train or instruct other employees are not managerial employees if they do not exercise sufficient independent discretion or judgment in carrying out those duties. See, e.g., *Roofing, Metal & Heating Associates*, 304 NLRB 155, 161 (1991) (an employee who “spent the great bulk of his time as an instructor with virtually no power or authority to act autonomously in any meaningful sense or deviate from . . . established policies” was not managerial), *enfd. sub nom. NLRB v. Roofers Local 30*, 975 F.2d 1551 (3d Cir. 1992); *A. Barton Hepburn Hospital*, 238 NLRB 95, 96 (1978) (in-service education assistant, who consulted with department heads who told her what training was needed in their areas, did not use independent judgment in formulating training courses and therefore was not managerial);¹¹ *Fairfax Family Fund, Inc.*, 195 NLRB 306, 308 (1972) (collection department instructor was not a managerial employee because the employer failed to produce any evidence that he assisted in formulating and developing the collection policies on which he instructed employees). However, the Board has found that an employee who exercises significant independent discretion in developing training programs is a managerial employee. See *Miller Electric Co.*, 301 NLRB 294,

¹¹ The Board described the in-service education assistant as “a teacher rather than someone who formulates and implements the management decisions of Respondent.” *Ibid.*

298–299 (1991) (employee who had overall responsibility for the development of a manual and training course for foremen was a managerial employee).

Consistent with the foregoing precedent, we find that the Employer has not established that the SIs are managerial employees, because any discretion that the SIs exercise in developing or conducting the training programs is severely restricted by NRC Regulatory Guide 5.75. This is true of each of the SIs’ duties relied upon by the Regional Director and the Employer as evidence of the SIs’ purported managerial status.¹²

First, although the SIs develop the lesson plans for the training programs and conduct the training, as discussed in more detail above, Attachment 1 to NRC Regulatory Guide 5.75 provides extensive instructions for the development of the lesson plans and leaves very little room for the SIs to exercise independent discretion.¹³ For example, SI Craig Lawson testified that some lesson plan content is taken word for word from NRC Regulatory Guide 5.75, that he has never developed a lesson plan during his five years as an SI, and that the Employer has used the same lesson plans “for a long time.” SI Alvin Ayers testified that when developing lesson plans, “[w]e have a limited amount of discretion, because the NRC kind of gives us the guidance on what the qualification is going to be.” Lawson further testified that the SIs do not have much control over how the critical elements are taught. Although in theory the SIs may select additional content to cover during training sessions, Lawson testified that during training, he simply gives his students the information included in the lesson plans and clarifies anything that they do not understand. Given that the SIs spend 60 to 70 percent of their time actually conducting training, “there is,” testified SI Ayers, “not a lot of time for lesson plan development.”

¹² The Regional Director relied in part on the SIs’ role as custodians of the Safeguards cabinets, which contain the Employer’s defense plan, to find that the SIs effectuate the Employer’s policies. However, the record indicates that the SIs merely possess the combination to the Safeguards cabinets and retrieve documents from those cabinets for employees who have a “need to know.” The Employer did not establish that the SIs exercise independent discretion to determine if an employee has a “need to know,” or that they exercise independent discretion to effectuate the Employer’s policies in any way in their role as custodians of the Safeguards cabinets.

¹³ The RD stated that the SIs can “expand upon the NRC guidelines and give instruction on subjects specific to the Employer’s practices, facility environment, and equipment.” Although the Employer’s Security Training Supervisor testified that the Employer goes “above and beyond” Attachment 1 to NRC Regulatory Guide 5.75 in some areas, the record does not contain any evidence of the SIs expanding on the guidelines or developing plans and programs that go beyond the 28 critical tasks in Attachment 1. Therefore, this evidence does not demonstrate that the SIs are managerial employees.

In sum, the record does not establish that the SIs exercise any significant degree of discretion independent of NRC Regulatory Guide 5.75 in “developing” the lesson plans, selecting any additional content for the lessons, or in choosing the manner in which to teach the critical elements. Quite the contrary.¹⁴

Second, the record does not establish that the SIs exercise sufficient independent discretion when creating or administering the exams that the SOs and SO supervisors must pass. Although the SIs write many, but not all, of the exam questions, the Security Training Supervisor must approve those questions before they are entered into the database, and the Employer, who bears the burden of proof here, failed to provide any evidence regarding how extensively the Security Training Supervisor reviews those questions.¹⁵ Further, the exam database randomly selects the questions for the exams; the SIs simply confirm that the selected questions cover all of the elements required by NRC Regulatory Guide 5.75. Finally, the NRC regulations require that personnel must achieve a minimum score of 80 percent to pass an exam, so the SIs have no discretion to determine whether an individual passes or fails.

Third, although the SIs conduct weapons training and qualification, here, too, they exercise very little discretion because NRC Regulatory Guide 5.75 contains exten-

sive instructions for weapons training and qualification. Moreover, the SIs certify merely that the course has been completed; the weapons qualification tests are pass/fail as determined by a laser system.

Fourth, the record does not establish that the SIs exercise sufficient independent discretion in designing, conducting, and evaluating the tabletop drills and the force-on-force exercises. Once again, NRC Regulatory Guide 5.75 provides extensive instructions and guidance regarding the drills and exercises. The SIs also have to take the Employer’s defense plan into account when designing the drills and exercises because these drills and exercises are intended to test the defense plan, and no witness had any knowledge that the SIs are involved in the creation of the defense plan.¹⁶ Finally, the record suggests that the SIs exercise very little discretion during the critique process; Lawson testified that during that process, he simply asks the participants questions from a form and records their answers.

Overall, the Employer has failed to demonstrate that the SIs exercise sufficient independent discretion in carrying out their duties such that they formulate or effectuate the Employer’s high-level policies. In reaching a contrary finding, the Regional Director primarily relied on *Miller Electric*, supra. In that case, however, the alleged managerial employee had overall responsibility for developing a manual and training course for foremen, among other duties, and the employer exercised only limited oversight over that employee. See *id.* at 295–299. The putative managerial employee was not required to adhere to any guidelines at all, let alone guidelines that were as extensive as NRC Regulatory Guide 5.75. See *ibid.* Thus, that employee exercised significantly greater

¹⁴ Our dissenting colleague describes Attachment 1 to NRC Regulatory Guide 5.75 as merely providing “a general list” of “training subjects.” However, as noted previously, NRC Regulatory Guide 5.75, which the Employer treats as a de facto regulation, states that an employer’s NRC-approved training and qualification plan should reflect the 28 critical tasks in Attachment 1 unless a task is not applicable to an employer’s operation. Further, the Employer’s Security Training Supervisor Bryan Gagnon testified that “Attachment 1 is a list of critical job functions that the officers are required to maintain proficiency in.” Because the Employer failed to provide specific evidence that the SIs have developed critical tasks beyond the tasks listed in Attachment 1, the record evidence shows that Attachment 1 effectively determines the critical tasks on which the SOs and SO supervisors are trained, the training elements for each critical task, the specific positions that are tested on each training element, the frequency with which each training element is tested, and the method of testing for each training element. Although we do not assert that NRC Regulatory Guide 5.75 and the other NRC Regulations form the entire basis for the lesson plans, based on the evidence before us, we cannot find, as our colleague apparently does, that the Employer has established that the SIs exercise a “considerable amount of independent discretion” in developing the lesson plans.

¹⁵ Our dissenting colleague correctly states that we do not dispute the Regional Director’s finding that “the [Employer’s] expectation is that the lesson plans are submitted complete and little, if any, changes are made by management,” because the record supports that finding. However, the *exam questions* are created and reviewed separate and apart from the lesson plans. The Employer did not produce any evidence, and the Regional Director did not make any finding, that the Security Training Supervisor makes “little, if any, changes” to the exam questions during review.

¹⁶ Our dissenting colleague fails to acknowledge the limitation on the SIs’ discretion presented by the mandate that they take the defense plan into account, along with NRC Regulatory Guide 5.75, in developing and conducting the tabletop drills and the force-on-force exercises. Ayers testified that the SIs “can’t just come in and say, ‘Hey, I want to do this to the plant.’” Lawson testified that the Employer’s defense plan “dictates where people are and what position they are in, and what they do.” Lawson further testified that the SIs merely develop scenarios to attack the plant in different locations and in different ways in order to evaluate whether the SOs are doing “what they are supposed to do.” Additionally, as our dissenting colleague discusses in more detail, the NRC regulations identify the types of threats that the Employer must be prepared to defend against, and, thus, represent another source of authority that limits the SIs’ discretion in developing the tabletop drills and force-on-force exercises.

independent discretion than the SIs here and essentially formulated new employer policies regarding foremen.¹⁷ We find that the SIs are more like the in-service education assistant in *A. Barton Hepburn Hospital*, supra, who consulted department heads to determine what training was needed. The SIs consult NRC Regulatory Guide 5.75 to develop the lesson plans, exams, drills, and exercises, and thus, like the in-service education assistant in *A. Barton Hepburn Hospital*, supra, are more akin to teachers than to employees who formulate and implement the Employer's high-level policies.

Finally, we do not believe that the purpose of the Board's managerial employee exclusion, which is "[t]o ensure that employees who exercise discretionary authority on behalf of the employer will not divide their loyalty between employer and union," *Yeshiva University*, supra, 444 U.S. at 687–688, will be advanced by finding that the SIs are managerial employees. If the SIs choose to join the existing unit, the SIs will continue to exercise only limited discretion in complying with the detailed instructions in NRC Regulatory Guide 5.75 to carry out their duties.¹⁸

Accordingly, for the reasons discussed above, we reverse the Regional Director and find that the Employer failed to establish that the SIs are managerial employees.

ORDER

The Regional Director's finding that the Security Training Instructors are managerial employees is reversed, and this case is remanded to the Regional Direc-

¹⁷ In *Miller Electric*, supra, although the Board emphasized that the putative managerial employee developed an extensive training program for supervisors, it did not purport to hold that any individual who develops a training program for supervisors is necessarily a managerial employee, regardless of the degree of independent discretion that he or she exercises in doing so. See *id.* at 298–299. In the present case, although the SIs develop lesson plans and conduct training for SO supervisors, they simply do not exercise the degree of independent discretion necessary to establish that they are managerial employees. In the other cases cited by the Regional Director, there was no evidence that the individuals lacked independent discretion. See *Miehle Printing Press & Mfg. Co.*, 113 NLRB 1252, 1253 (1955); *Peter Kiewit Sons' Co.*, 106 NLRB 194, 196 (1953); *Minnesota & Ontario Paper Co.*, 92 NLRB 711, 714 (1950). Therefore, like *Miller Electric*, supra, those cases are distinguishable from the present case.

¹⁸ Like our dissenting colleague, we acknowledge that maintaining the security of the Employer's facility is of the utmost importance. However, neither the SI's security orientation nor the importance of the job they perform has any bearing on whether the SIs are managerial employees. Indeed, none of the statutory or nonstatutory exclusions from the Act's definition of employee are premised on the importance of the work performed. Our colleague's implicit suggestion that employees' involvement in matters of national security is relevant to their right to select union representation (or not) finds no support in the Act or precedent.

tor for further appropriate action consistent with this Decision on Review and Order.

Dated, Washington, D.C. August 26, 2016

Mark Gaston Pearce,	Chairman
Kent Y. Hirozawa,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting.

The Employer operates a nuclear power facility. Because of the nature of the Employer's product, nuclear energy, its operations are strictly regulated by the Nuclear Regulatory Commission (NRC). The NRC requires that operators like the Employer, to protect the health and safety of the public, design and implement security plans to prevent potential attacks against their facilities. At the Employer's facility, four security training instructors (SIs) are responsible for ensuring that all security officers there have the skills, training, and qualifications necessary to perform this important task. The issue is whether these SIs are managers. The Regional Director determined that they are managers and thus dismissed a petition seeking a self-determination election among them. My colleagues disagree and reverse the Regional Director.

Contrary to my colleagues, I agree with the Regional Director that SIs are managerial employees. Although SIs rely on NRC guidelines when preparing lesson plans and designing training exercises, the record plainly demonstrates that they exercise a significant degree of independent discretion when doing so. Given the critical role SIs play in furthering the Employer's efforts to secure its facility, I also agree with the Regional Director that SIs' interests are more closely aligned with management than with unit employees. Accordingly, I do not believe that the Petitioner has met its considerable burden of showing that the Regional Director's determination departs from Board precedent or was clearly erroneous on a factual issue.¹

¹ See Board's Rule and Regulations Sec. 102.67(c) and (d).

DISCUSSION

Before examining the central dispute here—the precise role certain NRC guidelines² play in SIs’ job performance—it is worth pausing to consider the critical importance of maintaining the overall security of the Employer’s facility. The NRC promulgated its guidelines to ensure that operators like the Employer design “performance criteria for detecting, assessing, interdicting, and neutralizing threats up to and including the design basis threat (DBT) of radiological sabotage, thereby preventing significant core damage and spent fuel sabotage.”³ The NRC defines “radiological sabotage” as a “determined violent external assault, attack by stealth, or deceptive actions, including diversionary actions, by an adversary force.”⁴ The NRC also provides that operators should develop plans to thwart “theft or diversion of formula quantities of strategic special nuclear material.”⁵

Make no mistake. The Employer’s operations are not limited to the production of nuclear energy. Protecting its facility, employees, and the public at large from radiological sabotage and theft of nuclear material is just as much the Employer’s business interest.⁶ As explained below, SIs play a critical role in this matter vital to national security.

To protect itself against acts of radiological sabotage or theft, the Employer maintains a structured Security Department, which consists of two divisions, Security Operations and Security Support, each overseen by a superintendent. In Security Operations, Security Officer Supervisors (SO supervisors), who maintain military-

type ranks, oversee armed response officers, senior security officers, access control officers, and watchpersons, who are collectively referred to as security officers (SOs). Approximately 100 SOs work at the Employer’s facility. SIs work in Security Support and are supervised by a Security Training Supervisor. SIs must be certified in firearms training, must pass NRC instructor training, and must have at least three years’ experience working as security officers.

Relying on NRC guidelines, management expectations, information obtained from similar facilities, subject matter experts, past practices, and their own occupational experiences, SIs “develop lesson plans, design training programs, and create rules for the protection of the Employer’s property and personnel to satisfy NRC guidelines.”⁷ While an end user reviews the lesson plans developed by SIs, the Employer expects those plans to be complete when submitted for review. Indeed, end users typically approve plans with only minor changes. During classroom instruction, SIs may supplement their lesson plans with outside documents, instructional videos, and lectures from subject matter experts. SIs also create and administer on-the-job training, continuing education, and qualification exams to SOs and SO supervisors. While SIs write exams by accessing a database of already-written questions, all questions drawn from the database were initially written by SIs. Consistent with NRC guidelines, SIs train SOs and SO supervisors on the use of firearms.

SIs also design and implement tactical “tabletop” drills, which simulate a variety of real-life security-related scenarios on 3D models of the facility, and “force-on-force” drills, which involve simulated security threat drills conducted on facility grounds. The Regional Director explained:

The SIs design the drills and exercises to comply with the NRC guidelines. Tactical response drills are limited to specific security issues while the force-on-force exercises are plant-wide and may involve other non-security personnel and outside sources, including employees from other employer facilities. The SIs act as the lead controllers for the adversary role and they determine the placement and duties of the various players in the drill scenarios. The tactical exercises may last from 1 to 6 hours and occur quarterly in each of the 6 security operation blocks. The force-on-force exercises occur 6-8 times per year. Local law enforcement is notified of all force-on-force exercises to eliminate any fears of a real security threat.

² See NRC Regulatory Guide 5.75, Training and Qualification of Security Personnel at Nuclear Power Reactor Facilities, July 2009 (“RG 5.75” or “NRC guidelines”).

³ *Id.*, Introduction par. 3.

⁴ 10 CFR § 73.1(a) (2012). “Radiological sabotage” can include any number of attack “modes,” ranging from a “single group attacking through one entry point” to “a combination of one or more groups and one or more individuals attacking through multiple entry points.” 10 CFR § 73.1(1)(i). Such attacks can involve, among other things, “[w]ell-trained . . . and dedicated individuals, willing to kill or be killed,” the use of “handheld automatic weapons, equipped with silencers and having effective long range accuracy,” “incapacitating agents and explosives,” and a “bomb assault.” 10 CFR § 73.1(1)(A-E).

⁵ 10 CFR § 73.1(2)

⁶ Additional record evidence confirms this. The Employer maintains a security defense plan, which outlines its “strategy to protect and defend the plant, its employees, and the public from internal or external threats and attacks.” Regional Director’s Decision and Order (“D&O”) at 11. Security Training Supervisor Bryan Gagnon testified that the purpose of tactical drills (described in more detail below) is to “defend the public’s health and safety.” The Employer’s SI job description provides that SIs are responsible for “developing training materials . . . and conducting training to develop the knowledge, skills, and abilities of the security personnel in the performance of their job duties in the protection of the plant from theft or sabotage of special nuclear material.”

⁷ D&O at 6–7.

These drills and exercises are conducted by the SIs to ensure the Employer's security operations can keep the employees, public, and the facility safe from internal and external threats. After each drill, the SIs, as well as the training supervisor, the Security Support superintendent and the Security Department manager, then critique the performance of the players in the drill. The SIs conduct the critique by asking questions designed to address NRC guidelines and record the results. Every third year, the NRC attends and evaluates the force-on-force exercise and determines whether the facility passes its review. Individual personnel are not critiqued. The SIs serving as lead controllers in the force-on-force exercise will critique their opponent's performance. Lessons learned from the exercise are then incorporated by the SIs into their lesson plans for classroom instruction.⁸

The Regional Director found that SIs formulate and effectuate the Employer's policies by creating, implementing, and enforcing this security training. The Regional Director further found that SIs' interests are more closely aligned with management. Notwithstanding NRC guidelines, the Regional Director found that SIs exercise discretion when performing their jobs. Accordingly, the Regional Director found that SIs are managerial employees and thus dismissed the petition seeking a self-determination election in a unit of full-time and part-time SIs.

In reversing the Regional Director, my colleagues find that SIs are not managerial employees because any discretion they exercise in developing and conducting the training of SOs and SO supervisors is "severely restricted" by NRC guidelines. I respectfully disagree. In my view, the NRC guidelines reinforce a conclusion that they grant, and effectively require, SIs to exercise a significant amount of independent discretion when performing their training duties.

NRC guidelines concerning drills and exercises provide an instructive example. The NRC provides that licensees "should use" five "key program elements" when developing scenarios for drills and exercises.⁹ The

NRC has also identified 15 additional elements, which it explains can "also contribute to the successful demonstration of the key elements."¹⁰ NRC guidelines further explain that "security conditions that exist in the specific area are the optimum choice for a drill or exercise scenario."¹¹ Drills and exercises should also take into account "a variety of environmental and plant conditions," including time scenarios ("day or night"), power operations ("at power to refueling or other major maintenance"), and "both armed responders and mock adversaries."¹²

I do not agree with my colleagues that these guidelines severely restrict SIs' discretion in the design and implementation of drills and exercises. Quite the opposite, these guidelines simply provide a foundation of key elements and contingencies—albeit important ones—that SIs must draw from when designing drills and exercises. Suggesting that an exercise or drill should include broadly worded elements like "environmental and plant conditions," "time scenarios," "appropriate armament," "target set protection," "use of deadly force," "proper use of defensive positions," and "mock adversaries"—just to name a few—does not provide a step-by-step recipe for training, as my colleagues appear to find. At most, these guidelines provide a list of suggested ingredients. They do not contain any specific scenarios for drills and exercises. SIs must carry out the significant responsibility of translating these guidelines into teachable skills. It simply defies logic to suggest, as my colleagues do, that these generalized guidelines provide all that is needed to design and implement a full-scale, day-long simulated attack on the Employer's facility that is so realistic it necessitates prior notification to local law enforcement officials.

Testimony from two high-ranking members of the Employer's Security Department confirms this. SI Supervisor Gagnon testified that SIs go "above and beyond" NRC guidelines and "come up with what the exercise is going to be . . . [t]hey will run the exercise itself." Superintendent of Security Kenn Tate similarly testified that for force-on-force exercises, SIs "will prep a scenario based—they will outline and scope the event out and make that determination on how many [SOs] will use to conduct that drill or exercise." Moreover, SIs' formula-

⁸ Id. at 10.

⁹ RG 5.75 § 5.4(a). These elements are as follows: "(1) Responding with sufficient numbers of security personnel. The licensee has the required number of response personnel to effectively implement the protective strategy and protect the target sets against the DBT, (2) Responding with appropriate timelines. Response personnel have adequate time to reach their response positions in advance of the adversary timelines, (3) Responding to protected positions. Response personnel use appropriate protection and cover, (4) Responding with appropriate armament. Response personnel are supplied with, or have readily available, the weapons and equipment necessary to execute their responsibilities and are appropriately trained and qualified in the use of the weapons and equipment, and (5) Providing target set protection.

Response plan and response personnel prevent the DBT from completing sabotage of all components of any target set."

¹⁰ See § 5.4 (b). These additional elements include, among others, "coordination and planning," "command and control," "individual [and team] responder tactics," "use of deadly force," "weapons handling and proficiency," "proper use of defensive positions," and "deployment of responders and equipment."

¹¹ § 5.6.

¹² § 5.7(a) and (b).

tion of training drills and exercises is not confined to NRC guidelines. SIs rely on a variety of factors, including information obtained from similar facilities, subject matter experts, past practices, and their own occupational experiences. And SIs' involvement in these drills and exercises goes beyond their design and implementation. SIs participate in the critique of completed scenarios, which are used to ensure that the Employer passes NRC on-site reviews. Given this record evidence, I do not believe that the Regional Director erred by finding that "SIs have the discretion to take the NRC guidelines and then apply those guidelines to fit the Employer's own security system."¹³

As for the lesson plans, classroom instruction, and examinations developed and conducted by SIs, the guidelines relied upon by my colleagues merely provide a general list of 28 "critical [job] functions,"¹⁴ which the Regional Director alternatively described as "training subjects."¹⁵ These broad training subjects are broken down into tasks, which include, among others, "react to detection of contraband," "search vehicle," "observe employees/visitors for suspicious behavior," "[r]espond to confirmed tampering events," "react to loss of intrusion detection," "react to discovery of contraband and prohibited items," "determine if a legal arrest may be made," "identify tactics and force that an adversary group might use to achieve its objective," "react to a hostage situation," and "receive/react to a bomb/attack/extortion threat." Similarly, for annual written examinations, NRC

guidelines require a minimum score of 80 percent and provide that testing should include nine broad elements.¹⁶

I believe the record contradicts my colleagues' characterization of these training subjects and tasks as "extensive instructions" that leave "very little room for the SIs to exercise independent discretion." For example, consider the NRC guidelines that officers be taught to "react to a hostage situation" or a "bomb [] attack." An SI must rely on his or her experience, training, and judgment to design exercises and tactics that train officers to meet such challenges. The NRC guidelines cannot possibly form the entire basis for instruction or examination concerning such complicated and dangerous matters. Accordingly, as the Regional Director found with respect to SIs' involvement in lesson plans, while "NRC guidelines dictate the various subject areas in which instruction needs to be provided, the SIs determine the format and content of each lesson."¹⁷

In sum, the record establishes that SIs exercise a considerable amount of independent discretion when formulating and implementing security personnel training. As the Regional Director correctly noted, the Board has found that personnel who exercise independent judgment to formulate and implement an employer's training programs are managerial employees excluded from the Act's protection. See, e.g., *Miller Electric Co.*, 301 NLRB 294, 298–299 (1991) (employee a manager where employer told him to "make this project happen" and "put [a foremen's training manual] together;" the employee "had to pass judgment on the appropriateness of the various provisions contained in the manual and what source ma-

¹³ D&O at 15.

My colleagues note that the Employer maintains a "defense plan," which the Regional Director described "is the Employer's defensive security strategy to protect and defend the plant, its employees, and the public from internal or external threats and attacks." D&O at 11. My colleagues cite SI Lawson's testimony that the plan "dictates where people are and what position they are in, and what they do." Accordingly, I do not dispute my colleagues' determination that the record supports a finding that SIs "take the defense plan into account." This general finding—that SIs simply "take . . . into account" the plan—is consistent with the remainder of the record evidence here, which establishes that SIs rely on a variety of resources to formulate and implement security personnel training, but nonetheless exercise a considerable amount of independent discretion when doing so. Indeed, even my colleagues acknowledge that Lawson also testified that SIs "develop scenarios to attack the plant in different locations and in different ways in order to evaluate whether the SOs are doing 'what they are supposed to do.'"

¹⁴ See RG 5.75, Attachment 1. These functions include, among others, "perform visitor access control," "control personnel access to protected and vital areas," "perform material search," "conduct security patrols," "determine amount of force required to prevent an unauthorized act," and "react to bomb, hostage, and civil disturbance situations." Attachment 1 also lists the specific job positions that are subject to particular tasks, the frequency with which each task is tested, and the method of testing for each task.

¹⁵ D&O at 5.

¹⁶ § 6.1.3(c). These elements are "(1) role of security personnel in supporting safe operations of the facility, (2) the use of deadly force, including the principles involved in the application, escalation, and de-escalation of force, (3) 10 CFR Part 73 requirements for the protection of Safeguards Information, (4) the authority of private security personnel, (5) knowledge of who has power of arrest and authority to detain, (6) authority to search individuals and seize property, (7) offsite law enforcement response, (8) tactics and force that an adversary group might use to achieve its objective, and (9) response force deployment, tactical movement withdrawal, and use of support fire."

¹⁷ D&O at 7.

Although my colleagues note the Regional Director's broad finding that a Security Training Supervisor must approve examination questions before they are entered into the Employer's database, my colleagues do not dispute the Regional Director's additional finding that "the [Employer's] expectation is that the *lesson plans* are submitted complete and little, if any, changes are made by management." D&O at 14 (emphasis added). As the Regional Director correctly found, this minimal involvement in the content of lesson plans does not "diminish the SIs' effective power in formulating and implementing the Employer's security training program." Id. at 15 (citing *Republican Co.*, 361 NLRB No. 15, slip op. at 4 (2014) (newspaper editor, who was responsible for determining the content of an editorial page, a managerial employee where the employer "rarely" exercised its power to veto the editor's decisions)).

materials would be used”); cf. *Roofing, Metal & Heating Assoc.*, 304 NLRB 155, 160–161 (1991) (apprentice instructor not a manager where he implemented a training curriculum that “was already in place”).¹⁸

Finally, because of the nature of the Employer’s operations and the enormous national security responsibility of protecting the Employer’s facility from potential attacks, I agree with the Regional Director that SIs are more closely aligned with management than with unit employees. If the Employer fails to properly secure its facility, it can lose its operating license with the NRC. Through classroom instruction, on-the-job training, written examinations, and—most dramatically—through the development and facilitation of simulated full-scale attacks against the facility, SIs alone ensure that the Employer’s 100 security officers and their supervisors have the many skills necessary to properly secure the facility. Given the crucial role SIs play in fulfilling the Employer’s security requirements, it strains credulity to find that SIs are not managerial employees. See *NLRB v. Yeshiva University*, 444 U.S. 672, 682–683 (1980) (managerial employees “formulate and effectuate management policies by expressing and making operative the decisions of their employer”); *Miller Electric*, 301 NLRB at 298–299 (“in approving and reviewing the craft procedures manual,” which was “the guide to train foremen who in turn train or are responsible for the entire work force of craft employees,” the drafter of the manual “had to make decisions that formulated and effectuated the Company’s policies related to craft procedures”).

CONCLUSION

For the reasons set forth above, I believe that the record compels a finding that the four SIs are managerial employees excluded from the protection of the Act. I would thus dismiss the petition seeking a self-determination election in a unit of all full-time and part-time SIs. Accordingly, I respectfully dissent.

Dated, Washington, D.C. August 26, 2016

Philip A. Miscimarra,

Member

NATIONAL LABOR RELATIONS BOARD

¹⁸ In support of their determination that SIs do not exercise sufficient independent judgment, my colleagues cite SI Craig Lawson’s and SI Alvin Ayers’ testimony. Although Lawson testified that he had never personally created a lesson plan and the Employer has used the same lesson plans “for a long time,” he acknowledged seeing “other people working on one” and that “we have done [i.e., created]” the lesson plans. Although Ayers testified that there is “not a lot of time for lesson plan development,” and “[w]e have a limited amount of discretion [developing the lesson plans], because the NRC kind of gives us the guidance on what the qualification is going to be,” he immediately added, “we apply it to how it works in our system.” Regardless of Lawson’s and Ayers’ level of involvement in the development of the Employer’s current lesson plans, the parties do not dispute that it is SIs’ exclusive responsibility to create lesson plans and that only SIs have created all exam questions. And while Lawson testified that “some” lesson plan content is taken “word for word” from NRC guidelines, a plain reading of the guidelines establishes that they cannot possibly form the entire basis for a multitude of important training topics.

SIs are also responsible for conducting weapons training and qualification. Because the record plainly establishes that SIs exercise significant independent instruction when performing the remainder of their job duties, I need not pass on whether SIs also exercise discretion when performing these weapons-related duties.